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Nos. 82-1630 and 82-6695

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TED S. HUDSON,
Petitioner,

v.

RUSSELL THOMAS PALMER, JR.,
Respondent.

and

RUSSELL THOMAS PALMER, JR.,
Cross-Petitioner,

v.

TED S. HUDSON,
Cross-Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF FOR CROSS-PETITIONER

DEBORAH C. WYATT
414 Park Street
Charlottesville, Virginia 22901
(804) 296-4130
Attorney for Cross-Petitioner

LEON FRIEDMAN
School of Law
Hofstra University
Hempstead, New York
Of Counsel

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C. (202) 347-8203

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REPLY BRIEF FOR CROSS-PETITIONER

SUMMARY OF ARGUMENT

Petitioner's[1] entire position rests upon a total distinction for purposes of the Fourteenth Amendment between acts which are authorized by state law and intentional acts which are not authorized but are misuses of state power. Petitioner asserts that the due process clause is not implicated by the latter acts, for which acts state remedies are assumed. This distinction has long ago been rejected by the Court, the Court holding that the primary focus of the Fourteenth Amendment and the civil rights acts was precisely such abuse of power, and the existence of state remedies is irrelevant.

Petitioner's position is, furthermore, equally unsound today. The argument that possible compensation through state tort remedies for property taken by an official's abusive action constitutionalizes such wrongful action denigrates the Constitution's intended structure between citizen and state agent. It also allows for the arbitrary, abusive exercise of state power immune from federal review.

Finally, Petitioner's position would also undermine Congress' salutary efforts through 42 U.S.C. § 1997 *et seq.*

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[1] Petitioner and Cross-Respondent Hudson will hereinafter also be referred to simply as Petitioner, and Respondent and Cross-Petitioner Palmer will hereinafter also be referred to simply as Respondent.

ARGUMENT

A DELIBERATE DEPRIVATION BY A STATE OFFICIAL WITH NEITHER PRIOR PROCESS NOR JUSTIFICATION FOR THE FAILURE TO PROVIDE PRIOR PROCESS VIOLATES THE DUE PROCESS CLAUSE AT ONCE.

I. This Court Has Long Ago Rejected The Distinction Between Authorized And Unauthorized Official Action Upon Which Petitioner Rests His Contention That State Tort And Criminal Remedies Supply Due Process.

Petitioner's entire argument depends upon a complete distinction for purposes of constitutional protection between acts which are matters of established state procedure and those which are instead random and unauthorized. *See* Reply Brief on Behalf of Petitioner and Cross Respondent [hereinafter Reply Brief] at 2, 4, 5, 6, 7, 8, & 10. He argues that this distinction is decisive because in the former case a state has control over its agents, and in the latter it does not[2]; and because in the former case, the state's action will be complete, whereas in the latter

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[2] The act in this case was random only in that it was unauthorized. *Cf. Parratt* v. *Taylor*, 451 U.S. 527 (1981) (involving random deprivation in the sense used by the Court the year before in *Martinez* v. *California*, 444 U.S. 277 (1980), which involved the random killing by a nonofficial as a result of some remote official involvement.) In *Parratt*, as in *Ingraham* v. *Wright*, 430 U.S. 651 (1977), suits were brought against supervisory officials for what amounted to failure to have prevented a loss or abuse, and the analysis necessarily involved the practical ability of these officials to have prevented the loss through their policies. However, in the present case there is absolutely nothing in the record demonstrating inability to have controlled this guard. This is not in the record in part because no one but the guard himself has been sued, and thus the question of

situation, state tort or criminal action can yet be had.[3] Thus, he argues, where the violation is a matter of established state procedure, a deprivation may instantaneously violate due process but in the case of an unauthorized act it cannot.[4]

This distinction, upon which Petitioner's entire position depends, has been thoroughly repudiated by this

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control was truly immaterial. *Cf. Parratt* v. *Taylor* (suit against prison head, who had nothing personally to do with loss); *Ingraham* v. *Wright* (school officials sued, not abusive teachers); *Martinez* v. *California* (parole board sued, not murderer). *See generally Rizzo* v. *Goode*, 423 U.S. 362 (1976) (recognizing significant difference in suing offenders and suing those who have not somehow prevented offense). *See also Lugar* v. *Edmondson Oil Co*, 457 U.S. 922 (1982) (recognizing two separate types of due process claims: those against state procedures; and those against officials who abuse procedures).

[3] Petitioner quotes at length on this point from the Seventh Circuit's decision in *Bonner* v. *Coughlin*, 517 F.2d 1311 (7th Cir. 1975), *mod. en banc*, 545 F.2d 565, *cert. denied*, 435 U.S. 932 (1978). *See* Reply Brief at 5. However, as persuasive as that reasoning may be when applied to a loss or negligent action truly incapable of predeprivation process, the case did not address and did not purport to address intentionally abusive official action. *Kimbrough* v. *O'Neil*, 545 F.2d 1059 (7th Cir. 1976) (en banc).

[4] Petitioner assumes the existence of state remedies, in some form, from the fact that the act was unauthorized. Where no such remedies exist, however, Petitioner's position leads inescapably to the conclusion that a loss in an automobile accident or by a computer error, when an officer happens to be at fault, stands on equal constitutional footing with a willful abuse of power as that by a destruction of property under pretense of law in reckless disregard or open defiance of constitutional rights, as in this case.

Court. *E.g.*, *Monroe* v. *Pape*, 365 U.S. 167 (1961). This very distinction, and its entourage of purported justifications Petitioner asserts in connection therewith, were urged, and rejected, in *Screws* v. *United States*, 325 U.S. 91 (1945). There the Court held that the deprivation of life by officers effecting an arrest not only violated due process at once but was sufficient "open defiance", *id.* at 105, of constitutional rights that criminal prosecution for the due process violation was appropriate. In an argument familiar to this case, Petitioner Screws urged that, because the act was unauthorized and, in fact, violated state law, there was no due process violation. Justice Rutledge, concurring, addressed the argument as follows:

> [T]he position urges it is murder they have done, not deprivation of constitutional right. Strange as the argument is the reason. It comes to this, that abuse of state power creates immunity to federal power. Because what they did violated the state's laws, the nation cannot reach their conduct. This, though the prime object of the Fourteenth Amendment and [the civil rights acts] was to secure these fundamental rights against wrongful denial by exercise of the power of the states.

Id. at 114; *accord Monroe* v. *Pape*, 365 U.S. at 172.

From the Court's decision in *Ex Parte Virginia*, 100 U.S. 339 (1880), to that in *Monroe* v. *Pape*, *inter alia*, the law is settled that the act of an official which is made possible by virtue of his position *is* the act of the state. Such officials "carry a badge of authority of a State and represent it in some capacity whether they act in accordance with their authority or misuse it." *Id.* at 172. Such unauthorized acts are the "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with authority of state law. . . ." *United States* v. *Classic*, 313 U.S. 299, 326 (1941); *accord*

Ex Parte Virginia, 100 U.S. at 346. They are acts under "pretense of law", *Screws*, 325 U.S. at 111, and are prohibited by the Fourteenth Amendment regardless of state remedies. *Id.*; *Monroe* v. *Pape*; *cf. Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971) (state remedies irrelevant to Fourth Amendment question).

Thus, whether the intentional deprivation is the result of an isolated, impromptu policy of a sheriff or prison guard or is a matter of such broader application and duration as a state law makes no difference to the Fourteenth Amendment protection. *Screws*. Indeed, unlike the case of an established state procedure, which is the result of deliberative, legislative action and which is open for all to see, *cf. Ingraham* v. *Wright*, 430 U.S. 651 (1977) (openness reduces risk of abuse), and immediately challengeable if offensive to the Constitution, it is in the former situation, involving day to day operations of a sheriff, magistrate, policeman, prison guard, where abuse is most likely to occur and where the Fourteenth Amendment protection becomes all the more important. Consequently, it is precisely such lawless acts, such abuses of power and not the lawful exercise of power, which the Fourteenth Amendment and § 1983 were most specifically designed to prevent and deter. *E.g.*, *Monroe* v. *Pape*; *Screws*; *cf. Briscoe* v. *Lahue*, 103 S.Ct. 1108, 1118 (1983) (dictim) (civil rights acts aimed at abuse of power).

Accordingly, the basic distinction upon which Petitioner's position rests has been long and solidly rejected by this Court.[5]

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[5] While an intentional deprivation without prior process and without any constitutionally acceptable excuse for the failure to provide prior process will implicate the due process clause, *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), the degree to which the deprivation was or

II. Petitioner's Position That State Remedies Should Constitutionalize An Official's Abusive Deprivation Would Upset The Critical Relationship Between Citizen And Government Which The Constitution Was Intended To Secure.

a. *Petitioner's position fails to recognize the important difference between an act by an official armed with the power of the state and the same act by a civilian.*

By urging that state tort remedies are sufficient process in the case of an intentional taking, Petitioner in this case, as the government in *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971),

> seek[s] to treat the relationship between a citizen and a [governmental] agent unconstitutionally exercising his authority as no different from the relationship between two private citizens. In so doing, [it] ignore[s] the fact that power, once granted, does not disappear like a magic gift when it is wrongfully used. An agent acting—albeit unconstitutionally—in the name of the [government] possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own.

Id. at 391-92.

Nothing is more central to our "framework of ordered liberty," *Kolender* v. *Lawson*, 103 S.Ct. 1855, 1858 (1983), than the interrelationship between citizen and state agent. Because of the greater strength of the state,

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was not authorized might, of course, enter the analysis of good faith immunity. Thus, an intentional deprivation based on a reasonable belief, judged objectively, that the taking was permissible and constitutionally authorized might bar recovery. *See Procunier* v. *Navarette*, 434 U.S. 555 (1978).

the Constitution provides barriers specifically designed to limit an officer's power against a citizen.

> [T]he type of harm which officials can inflict when they invade protected zones of an individual's life are different from the types of harm private citizens inflict on one another. . . . The injuries inflicted by officials acting under color of law . . . are substantially different in kind . . ."

Bivens, 403 U.S. at 408-09 (Harlan, J., concurring); *accord, e.g., Monroe* v. *Pape*, 365 U.S. 167, 196 (1961) (Harlan, J., concurring). The Constitution recognizes this difference, and § 1983 provides for redress of official acts above and beyond remedies possibly available in state court. *Monroe* v. *Pape*.[6]

The Constitution offers extra protection when an officer seeks to enter a home because an officer requesting entry simply stands in a position altogether different from that of a neighbor requesting the same. *Bivens*. Thus, though a neighbor may only trespass, an officer's unlawful entry offends the Constitution.

Similarly, as in the present case, when an officer is put in a position by the state to destroy a man's property, as

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[6] Negligent deprivations do not implicate this relationship. An officer who negligently damages or deprives is not doing so by use of the power of the state, is not doing so under "pretense of law", *Screws* v. *United States*, 325 U.S. 91, 111 (1945), whether authorized or unauthorized. Thus, an automobile accident is no more under pretense of law because the driver happens to be wearing a uniform than when he happens not to be, nor is a computer error or an accidental loss of a package in the mail any more a use of the power of the state when attributable to officials than when attributable to anyone. In such cases, the deprivation is *despite* the badge not *because* of it. Such acts are thus significantly different from acts which are in "open defiance" or in "reckless disregard" of constitutional rights. *Id.* at 105.

by being made a prison guard, the deliberate use of that power in the illegitimate destruction of property is not just conversion or trespass; it is a breach of the due process clause which stands as a barrier between the officer and an individual's life, liberty, and property. *Cf. Kolender* v. *Lawson* (the due process clause prohibits the arbitrary exercise of power). Such injuries, which should be "compensable according to uniform rules of federal law," *Bivens*, 403 U.S. at 409 (Harlan, J., concurring), are thus subject to constitutional correction, to a declaration that what has been done violates the supreme laws of this country. To conclude that state remedies for conversion and trespass are sufficient, as if the act had been committed by a civilian neighbor, is to denigrate this long-recognized constitutional structuring and intent.[7]

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[7] Rather than a "vast majority" of decisions favoring Petitioner's position as Petitioner asserts, *see* Reply Brief at 7, the cases seem at most evenly divided. Petitioner has evidently missed a few decisions and circuits. *See, e.g., Clark* v. *Taylor*, 710 F.2d 4 (1st Cir. 1983); *McCoy* v. *Gordon*, 709 F.2d 1060 (5th Cir. 1983); *Weiss* v. *Lehman*, 676 F.2d 1320 (9th Cir. 1982); *Hirst* v. *Gertzen*, 676 F.2d 1252 (9th Cir. 1982); *Wright* v. *Dallas County Sheriff Dept.*, 660 F.2d 623 (5th Cir. 1981); *Madyun* v. *Thompson*, 657 F.2d 868 (7th Cir. 1981); *cf. Burtnieks* v. *City of New York*, 716 F.2d 982 (2d Cir. 1983) (discussing *Parratt* v. *Taylor* as based on negligence); *Jackson* v. *City of Joliet*, 715 F.2d 1200 (7th Cir. 1983) (noting that, if due process is not provided, "it makes no difference whether the State hangs you or has you shot down in the street by a police officer"); *State Bank of St. Charles* v. *Camic*, 712 F.2d 1140 (7th Cir. 1983) (*Parratt* applied to "simple negligence" case). *See generally Languirand* v. *Hayden*, 717 F.2d 220, 224 n.6 (5th Cir. 1983) (expressing inability to predict *Parratt's* application if any beyond facts of *Parratt*). *See also* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 26.14 (1982 Supp.) ("The weakness in the proposition that an intentional taking is not unconstitutional on account of the later remedy is that at the moment when

b. ***Petitioner's position leaves state officials open to arbitrary, abusive action assuming the officials are willing to risk eventual repayment of the precise monetary value of what they take.***

Overlooking the difference in official and civilian conduct, Petitioner's argument concludes that, so long as Palmer could, through suit in state court, recover the property or receive the monetary value of property that was taken from him, the due process guarantee is not implicated.[8] The facts that Palmer *might* be able to sue in state court for a violation of state law,[9] *and* be able to carry his burden of proof that his property is his own, *and* be able to collect from the guard the monetary value of the property destroyed, *and* accomplish all of this within a period of several years depending on the congestion of a court's docket and the strategies of those such as the

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the property is taken, the official has violated the Constitution and the later remedy cannot change that fact.")

Lower court language in support of Petitioner's position is often more an incorrect attempt to apply *Parratt* v. *Taylor* than the result of any independant reasoning. *See Palmer* v. *Hudson*, 697 F.2d 1220 (4th Cir. 1982); *Tydings* v. *Department of Corrections*, 714 F.2d 11 (4th Cir. 1983) (case governed by *Palmer's* interpretation of *Parratt*); *id.* (Fairchild, J., sitting by designation, concurring only because of stare decisis in the Fourth Circuit).

For perhaps one of the most thorough and carefully reasoned post-*Parratt* decisions, see *Begg* v. *Moffitt*, 555 F.Supp. 1344 (N.D. Ill. 1983).

[8] If the due process clause meant no more than this, it is curious why the Founding Fathers thought it necessary to add that property cannot be taken for public use without just compensation. *See* U.S. CONST. amend. V.

[9] There is no evidence that Respondent knew of any state tort remedies.

Attorney General who might be defending the guard, these together present the sum and substance, so says Petitioner, of our due process guarantee against intentional, abusive, unauthorized actions by state officials.

To adopt the position that the due process inquiry is complete upon the availability of compensation would mean that a state or local official *by use of government power* may snatch away property without any valid or even arguably valid authority and, though he may have to return the property, thumb his nose at the United States Constitution and the federal courts, both powerless to touch him.

Such a position would mean that when a man takes a walk down his neighborhood street to visit the corner grocery, the Constitution provides him no protection against a uniformed officer who calls him over and tears off his coat, snatches his hat, or dumps out the goods he has bought, and only because the officer did not like the man or the way the man dressed, did not like the color of the man's skin or did not like the man's political affiliation. *But see Kolender* v. *Lawson*, 103 S.Ct. 1855 (1983). Such a position would accomplish what every state is prohibited from doing by statute, allowing "policemen . . . to pursue their personal predelictions." *Id.* at 1858-59 (quoting *Smith* v. *Goguen*, 415 U.S. 566, 575 (1974)). So long as the man could file suit in state court for the value of the groceries, the constitutional duty of the state would be complete and such misuse of power and deprivation of liberty and property would not implicate the due process clause and would be immune from federal review.

Even more, the very moment the victim of such abuse emerges from the state courthouse having prevailed, if he is lucky, in proving that the officer had no right to take the goods and that they should be returned, the very same

officer could snatch them away again on the courthouse steps; and the whole lengthy suit process could but begin all over again, all without the availability of federal court review, all without any constitutional protection, all without any assurance that the victim of such abuse could ever stop such actions. For though a state *might* provide disincentives for such repeat offenses or some form of injunctive relief, the requirement for such remedies is, under Petitioner's argument, no longer of federal concern. Even if Palmer could recover the value of his property in a state court tort suit, the fate of his request for injunctive relief, his first request (App-8 & 22), would be, under Petitioner's position, irrelevant to any federal court.

Clearly, it was precisely such abusive intrusions into a person's life which the due process clause and § 1983 were most specifically designed to prevent. The abusive, arbitrary, illegitimate exercise of governmental power resulting in the deprivation of life or liberty or property violates due process at once. Accordingly, the abusive destruction by Guard Hudson deprived Palmer of property without due process.

III. Petitioner's Position Would Misserve Congress' Express Purposes For Enacting § 1997, To Cure Institutional Abuses And To Stem The Resilting Tide Of Prison Litigation.

In addition to urging that persons subjected to deprivation in a misuse of state power must look to state courts for redress, Petitioner refers the Court to prison grievance procedures. Both parties agree that the recent procedures adopted recently by Virginia and certified pursuant to the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 *et seq.*, are not applicable to this case. *See* Reply Brief at 13 n. 14. Guard Hudson destroyed Palmer's property on September 16, 1981, this action was

begun September 28, 1981, and the new grievance procedures were not in effect until over a year later.[10]

Yet the passage of § 1997 is significant to the due process issue before the Court in that the Act and the concerns which prompted its passage would be undermined by Petitioner's position. The history surrounding the Act makes clear that Congress sought to improve the conditions in our states' prisons.

> Congress hoped that § 1997e would improve prison conditions by stimulating the development of successful grievance mechanisms.

Patsy v. *Board of Regents*, 457 U.S. 496, 511 (1982). In particular Congress sought to cure abuses which Congress believed to be in violation of the Constitution and thus redressable under § 1983. *See, e.g.*, § 1997a; § 1997b; § 1997c; H.R.REP. NO. 897, 96th Cong., 2d Sess. (1980).

To effect this cure, the United States Attorney General was granted authority to initiate actions in cases involving denials of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States. § 1997a. Moreover, Congress encouraged the states to adopt meaningful, standardized grievance procedures by the incentive of a unique exhaustion requirement for prisoner § 1983 litigation in states with such procedures. § 1997e.

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[10] Petitioner does suggest that Petitioner should have used the then-existing grievance procedures. However, in addition to other deficiencies in those old procedures, they did not even pretend to provide compensation for property destroyed.

By procuring through this incentive the adoption by the various states of more meaningfully corrective grievance procedures, the Act also serves the stated goal of curbing the proliferation of prisoner § 1983 suits. *See* H.R.REP. No. 897, 96th Cong., 2d Sess. 9 (1980). It was Congress' studied determination that such thorough grievance procedures would serve to reduce the incidence of institutional abuse, and complaints concerning such abuses would have a more realistic chance of being resolved administratively to a prisoner's satisfaction. Thus, § 1983, which would continue to be available to redress such abuses, would be less used because less needed.

> The effect of (§ 1997) would be to secure basic legal and constitutional rights for institutionalized persons, and to assist in relieving the caseloads of Federal courts in prisoner petitions.

Id.

The present case illustrates this potential impact. Even before seeking damages, Palmer sought correction of the oppressive situation. He sought to have his oppressor, Guard Hudson, removed. Prospective relief was his primary goal. (App-8 & 22). Had an effective, meaningful grievance procedure then been in effect, the abuses by Guard Hudson might have been taken more seriously by the prison officials and Hudson might have been removed or relocated if the allegations were verified. While such procedures do not render an abusive deprivation any less a due process violation, and thus it remains Congress' intent under the Act that Palmer could still proceed into federal court under § 1983 were he to choose to do so, his main object would have been fulfilled and this suit might never have been brought.

However, the linch-pin of this entire legislative program is Congress' belief and assumption that the abuses

to be curbed by the certified grievance procedures and to be cured by federal intervention are of *constitutional* dimension. All provisions carry the same language as that of § 1983 itself, in addressing only violations of constitutional or federal statutory rights. Indeed, it was upon such an assumption that Congress based its authority, upon § 5 of the Fourteenth Amendment. 125 CONG. REC. 12,491 (1979) (remarks of Rep. Drinan).

Thus, for this Court to hold that such abuses as that by Guard Hudson do not implicate the rights, privileges, and immunities of the Constitution, and thus to relegate prisoners instead to possible recollection of property value in state court, would both misserve Congress' purposes and gut the Act itself. The abusive conditions found by Congress to exist in many of our state's prisons and mental institutions would only worsen because a powerful deterrence, for which § 1983 was intended, *e.g.*, *Smith* v. *Wade*, 103 S.Ct. 1625 (1983), would be removed. Further, states would lose their "incentive to adopt grievance procedures capable of certification because prisoner § 1983 cases could be diverted", in this case forever, "to state . . . remedies in any event." *Patsy* v. *Board of Regents*, 457 U.S. at 511-12. Thus, the Commonwealth of Virginia might not only be the *first* state to obtain such certification, it might well be the *last*. Finally, the United States Attorney General would remain, despite Congress' efforts and intent, powerless to correct such abuses even where rampant, because his enforcement power is tied to constitutional violations.

Accordingly, Congress' goals in enacting § 1997, and its own belief that deprivations from abusive treatment by the misuse of power violate the Fourteenth Amendment and that relegation to state courts for such prisoners is an

insufficient remedy, should be given persuasive weight in this Court's consideration of this issue.

CONCLUSION

For the reasons stated herein, together with the reasons set forth in the Brief for Respondent and Cross-Petitioner, the decision below as it pertains to the due process claim should be reversed.

Respectfully submitted,

DEBORAH C. WYATT
414 Park Street
Charlottesville, Virginia 22901
(804) 296-4130
Attorney for Cross-Petitioner

LEON FRIEDMAN
School of Law
Hofstra University
Hempstead, New York
Of Counsel